

STATE OF CALIFORNIA

Energy Resources Conservation And Development Commission

In the Matter of:)	Docket No. 00-AFC-12
)	
Application for Certification of)	Staff's Opening Brief on
Duke Energy's Morro Bay Power)	California Coastal Act Issues
Plant Project)	
_____)	February 18, 2004

INTRODUCTION

On February 4, 2004, the Morro Bay AFC Committee (Committee) issued a **Notice of Public Hearing and Hearing Order** (Order) for the Morro Bay Power Project (project). That Order addressed a January 13, 2004 filing in this docket by the Executive Director of the California Coastal Commission (CCC or Coastal Commission). The filing contained the comments of the Coastal Commission on the Revised Presiding Member's Proposed Decision for this project. In the filing, the Coastal Commission raised several legal issues concerning the issue of whether the project is in conformity with the policies of the California Coastal Act (Pub. Resources Code section 30000 et seq.) and the Local Coastal Program (LCP) of the City of Morro Bay (City).¹ The Order scheduled a hearing for March 3, 2004, and directed parties wishing to present oral legal arguments at the hearing to file opening briefs on the following issues on February 18, 2004:

- 1) May the Committee rely on the City's determination of Project conformance with the LCP?
- 2) Can the Energy Commission independently determine whether a project complies with Coastal Act policies or is it bound by the determination of the CCC?
- 3) What are the appropriate legal and conceptual criteria for the Energy Commission to apply in the event that it finds a non-compliance with Coastal Act and LCP policies and must consider an override of Coastal Commission findings pursuant to Public Resources Code section 25525?

This brief presents staff's answers to those questions.

¹ An LCP consists of documents submitted by a local government to the Coastal Commission demonstrating the ability of the local government to implement the policies of the Coastal Act. (Pub. Resources Code section 30108.6) After an LCP is approved by the Coastal Commission, the local government exercises the development review authority of the Coastal Act. (Pub. Resources Code section 30519)

ARGUMENT

I. The Committee May Not Rely On The City's Determination Of Project Conformity With The LCP Where The Coastal Commission's Suitability Report Contains A Finding To The Contrary.

Under California law, the authority of the Energy Commission to license thermal power plants with a capacity of 50 MW or greater is exclusive. Public Resources Code section 25500 states:

[T]he commission shall have the exclusive power to certify all sites and related facilities in the state. . . The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law. . . and shall supercede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency, to the extent permitted by federal law.

However, the Energy Commission is required to consider the legal requirements that are not applicable as a result of the Energy Commission's exclusive jurisdiction. In fact, the Energy Commission is required to make findings regarding the conformity of the project with relevant local, regional, state, and federal standards, must take certain steps in the event it finds noncompliance with otherwise applicable ordinance or regulations, and is prohibited from certifying a facility it finds does not conform unless specific findings are made. (Pub. Resources Code sections 25523(d)(1)), 25525)²

In addition, there are provisions establishing a unique role for the Coastal Commission in the Energy Commission's licensing process. Specifically, under provisions of the Coastal Act, the Coastal Commission is directed to participate in Energy Commission licensing proceedings for projects located in coastal areas and to prepare a written report on the suitability of the project. (Pub. Resources Code section 30413(d)) The statutory provisions state that the report shall contain "a consideration of, and findings regarding" seven specific issues, including "the conformance of the proposed site and related facilities with certified local coastal programs. . . ." If the report identifies that specific provisions are necessary to meet the objectives of the Coastal

² The applicable Public Resource Code provisions use the word "compliance" when addressing an "ordinance or regulation" and the word and "conformance" when addressing "standards, ordinances or laws", or "standards." This distinction is not at issue in this proceeding.

Act, the Energy Commission must include those provisions in any decision approving the project, unless the Energy Commission finds that they would result in greater adverse impact on the environment or are not feasible. (Pub. Resources Code section 25523(b))

In this proceeding, the Coastal Commission found that the proposed project would create a non-conformity with the LCP and identified provisions to correct the non-conformity. Therefore, the Energy Commission's responsibility regarding the conformity of this project with the LCP is limited to including in its decision the provisions identified in the Coastal Commission report or, in the alternative, making the findings specified in Public Resources Code section 25523(b). The Energy Commission may *not* rely on the City's conclusions to the contrary to support a finding that the project without the provisions specified by the Coastal Commission is in conformity with the LCP.

II. The Energy Commission Cannot Independently Determine Whether A Project Complies With Coastal Act Policies When The Coastal Commission's Suitability Report Identifies Provisions Necessary To Achieve Conformity With Those Policies.

As discussed above, the statutory scheme found in the Coastal Act and the Warren-Alquist Act provides a special role for the Coastal Commission in the Energy Commission's licensing process. Although the Energy Commission has the final authority to determine the consistency of a project with other applicable laws and standards, the Coastal Commission's suitability report may contain a finding that certain provisions are necessary to meet the policies of the Coastal Act. That has happened in this proceeding, and as a result, the Energy Commission is bound by the Coastal Commission's determination that the project without the provisions does not comply with Coastal Act policies.

In fact, Public Resources Code section 25523(b) *requires* the Energy Commission to implement the provisions identified by the Coastal Commission "to meet the objectives of the [Coastal Act]", unless certain findings are made. Allowing the Energy Commission to second-guess the Coastal Commission and independently determine that a project conforms to Coastal Act policies without these provisions when the Coastal Commission has made a finding to the contrary would make a nullity of this provision. Therefore, where, as here, the Coastal Commission has

identified provisions necessary to achieve conformity with Coastal Act policies, the Energy Commission can *only* address that non-conformity by including the provisions identified in the suitability report in its final decision on the project, or by making the findings identified in Public Resources Code section 25523(b).

III. If The Energy Commission Considers Approving A Project That Does Not Comply With The Coastal Act Or The LCP, It Must Apply The Provisions Of Public Resources Code Section 25525.

Public Resources Code section 25525 specifies that the Energy Commission may not certify facilities that it finds do not conform with any applicable state, local, or regional standards, ordinances, or laws, unless certain findings are made. These findings are clearly stated in the statute itself:

The facility is required for public convenience and necessity; and

There are not more prudent and feasible means of achieving such public convenience and necessity.

There are no other findings that are required by law, although the use of the word “may” in Public Resources Code section 25525 indicates that a decision to certify a facility that does not conform with applicable standards or laws is clearly a discretionary one. Thus, the Energy Commission could consider other additional factors in making a decision to certify such a facility, as long as the decision is not arbitrary, capricious, or lacking in evidentiary support. Staff has no recommendations concerning any such additional factors.

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CONCLUSION

In conclusion, staff believes that there is a clear statutory scheme governing the determination of Coastal Act consistency (and LCP consistency) for projects subject to Energy Commission jurisdiction. Where the Coastal Commission's suitability report identifies provisions necessary to ensure conformity with the LCP or Coastal Act policies, the conclusion concerning conformity is binding, and the Commission must include the provisions identified in the suitability report in the Energy Commission decision or make the findings identified in Public Resources Code 25523(b). In addition, when considering whether to certify a facility that does not conform to the policies of the Coastal Act or the LCP, the Energy Commission can and should implement the provisions of Public Resources Code section 25525. We encourage the Energy Commission to ensure that the issues of LCP and Coastal Act conformity are consistently addressed in this fashion for all projects located within the coastal zone.

Date: February 18, 2004

Respectfully submitted,

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